

TOM McMAKIN

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<p>IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BUTTE DIVISION</p> <hr/> <p>JOHN MEYER, Plaintiff, vs. Cause No. 18-CV-00002-BMM BIG SKY RESORT, INC. Defendant.</p> <hr/> <p>VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF TOM McMAKIN</p> <hr/> <p>BE IT REMEMBERED, that the videotaped deposition upon oral examination of TOM McMAKIN, appearing at the instance of Defendant, was taken at the offices of Crowley Fleck, PLLP, 1915 South 19th Avenue, Bozeman, Montana 59718 on the 21st day of January 2020, beginning at the hour of 1:34 p.m. pursuant to the Federal Rules of Civil Procedure, before Marla Jeske, Court Reporter - Notary Public, CSR.</p>	<p>1 INDEX</p> <p>2 EXAMINATION OF TOM McMAKIN BY PAGE</p> <p>3 Mr. Ian McIntosh, Esq.....5, 35</p> <p>4 Ms. Breean Walas, Esq.....19, 38</p> <p>5 E X H I B I T S R E F E R R E D T O:</p> <p>6 Exhibit 19.....35, 38</p> <p>7 Exhibit 24.....8, 13-14, 19, 27</p> <p>8 Exhibit 25.....9-10, 13-14, 19-20, 27</p> <p>9 Exhibit 29.....11, 13, 19</p> <p>10 DEPOSITION EXHIBITS:</p> <p>11 Exhibit 65 Colored Photograph.....20-21</p> <p>12 Exhibit 66 Big Sky Ski Patrol</p> <p>13 Witness Statement</p> <p>14 dated 12/11/15.....22-23</p> <p>15 Exhibit 67 Evi Dixon letter dated</p> <p>16 Sunday, December 13, 2015.....25-26</p> <p>17 Exhibit 68 Colored Photograph.....36-37</p> <p>18 Exhibit 69 Colored Photograph.....36-37</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>Page 2</p> <p>1 APPEARANCES</p> <p>2</p> <p>3 ATTORNEY APPEARING ON BEHALF OF THE</p> <p>4 PLAINTIFF, JOHN MEYER:</p> <p>5 Ms. Breean Walas, Esq.</p> <p>6 Walas Law Firm</p> <p>7 P.O. Box 4591</p> <p>8 Bozeman, Montana 59772</p> <p>9 breean@walaslawfirm.com</p> <p>10 (501) 246-1067</p> <p>11 ATTORNEYS APPEARING ON BEHALF OF THE</p> <p>12 DEFENDANT, BIG SKY RESORT:</p> <p>13 Mr. Ian McIntosh, Esq.</p> <p>14 Mr. Mac Morris, Esq.</p> <p>15 CROWLEY FLECK PLLP</p> <p>16 1915 South 19th Avenue</p> <p>17 P.O. Box 10969</p> <p>18 Bozeman, MT 59719-0969</p> <p>19 imcintosh@crowleyfleck.com</p> <p>20 wmmorris@crowleyfleck.com</p> <p>21 (406) 556-1430</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 4</p> <p>1 WHEREUPON, the following proceedings were had</p> <p>2 and testimony taken, to-wit:</p> <p>3</p> <p>4 * * * * *</p> <p>5</p> <p>6 VIDEO TECHNICIAN: This is the time and</p> <p>7 place set for the video deposition of Tom McMakin</p> <p>8 in the case of John Meyer, plaintiff, versus Big</p> <p>9 Sky Resort, defendant. It is Cause Number</p> <p>10 18-CV-00002-BMM in the United States District Court</p> <p>11 for the District of Montana, Butte Division.</p> <p>12 This video deposition is being held at</p> <p>13 the offices of Crowley Fleck, located at 1915 19th</p> <p>14 Avenue in Bozeman, Montana.</p> <p>15 Today's date is January 21st, 2020. The</p> <p>16 time is 1:34 p.m.</p> <p>17 The court reporter is Marla Jeske with</p> <p>18 Bridger Court Reporting. I'm Mark Brown, the</p> <p>19 videographer.</p> <p>20 Will the attorneys please now identify</p> <p>21 themselves for the record.</p> <p>22 MS. WALAS: Breean Walas on behalf of the</p> <p>23 plaintiff.</p> <p>24 MR. McINTOSH: Ian McIntosh for the</p> <p>25 defendant, with Mac Morris.</p>

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TOM McMAKIN

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<p>1 VIDEO TECHNICIAN: Will the witness now 2 please be sworn in. 3 4 * * * * * 5 6 TOM McMAKIN, 7 called as a witness herein, having been first duly 8 sworn, was examined and testified as follows: 9 10 EXAMINATION 11 BY MR. McINTOSH: 12 <b>Q. Can you please state your name?</b> 13 A. Full name is Thomas Wilson McMakin, Tom 14 McMakin. 15 <b>Q. Mr. McMakin, where do you live?</b> 16 A. 305 Evening Star Lane, Bozeman, Montana. 17 <b>Q. And, Mr. McMakin, what do you do for</b> 18 <b>work?</b> 19 A. I'm a CEO of a consulting firm called, 20 Profitable Ideas Exchange. 21 <b>Q. What does Profitable Ideas Exchange do?</b> 22 A. So we help large professional services 23 firms, like accounting firms and firms like Bain or 24 BCG or McKinsey, drive their business development 25 efforts.</p>	<p>1 A. Correct. 2 <b>Q. And can you describe your ski abilities</b> 3 <b>at that time?</b> 4 A. Yeah, so I've been skiing -- I'm 58. 5 I've probably been skiing since I was five years 6 old. But I'm not a double black diamond expert 7 skier. I look good on tough blue square groomers 8 and I can get down anything, so somewhere in that 9 netherworld between high intermediate and low 10 expert. 11 <b>Q. Got it. And how about the people you</b> 12 <b>were skiing with, how did your abilities compare to</b> 13 <b>them?</b> 14 A. You know, we broke up, because we 15 probably had 40 people there with partners, into 16 smaller groups and I was with a fast group. So, I 17 mean we were all comparable. 18 <b>Q. Okay. And sometime after 10:00 a.m. in</b> 19 <b>the morning, were you skiing the Challenger</b> 20 <b>chairlift area?</b> 21 A. Yes. 22 <b>Q. And do you remember what you skied?</b> 23 <b>Shortly before you witnessed John Meyer's ski</b> 24 <b>wreck, do you remember what ski run you skied?</b> 25 A. I don't. I don't have very good</p>
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<p>1 <b>Q. Thank you.</b> 2 <b>And I understand that you were skiing at</b> 3 <b>the Big Sky Ski Resort on December 11, 2015; is</b> 4 <b>that correct?</b> 5 A. Correct. 6 <b>Q. And did you witness a ski wreck</b> 7 <b>involving a person that you later learned was</b> 8 <b>John Meyer?</b> 9 A. I did. 10 <b>Q. Okay. I want to talk to you in detail</b> 11 <b>about that ski wreck. But before we get into the</b> 12 <b>details about the wreck, I want to back up and just</b> 13 <b>talk about what you were doing there and why you</b> 14 <b>were there that day --</b> 15 A. Sure. 16 <b>Q. -- okay?</b> 17 <b>So let's start with that. Before we get</b> 18 <b>into any of the details, tell me what were you</b> 19 <b>doing at Big Sky on December 11, 2015?</b> 20 A. So we had -- I think at the time we had 21 about 30 people in the company, PIE, Profitable 22 Ideas Exchange, and we had taken them and their 23 spouses or partners on a ski day. 24 <b>Q. So you were skiing just with your</b> 25 <b>employees?</b></p>	<p>1 knowledge. My recollection is that we skied out of 2 Moon Light Basin, the tented area there and we were 3 kind of skiing over to the Big Sky. So the run in 4 question was kind of a -- kind of a northeastern 5 facing run, that's my recollection, moving toward 6 the Big Sky Resort, yeah. 7 <b>Q. Okay. So you were moving towards the</b> 8 <b>Big Sky base area?</b> 9 A. Yeah, exactly. 10 <b>Q. Okay. I'm going to hand you what has</b> 11 <b>previously been marked in this case as Exhibit</b> 12 <b>Number 24.</b> 13 A. Uh-huh. 14 <b>Q. Do you recognize what is shown in</b> 15 <b>Exhibit 24?</b> 16 A. Sure. So as I look at this, behind me 17 is a steep slope and this is a traversing road that 18 roughly goes from the south to the north and in 19 front of that is a kind of ungroomed area and the 20 wide slope in the sort of more distant perspective 21 goes down to the base area. And I know there's a 22 big -- I mean I knew afterwards because we went 23 down, there's a big ski patrol hut there. 24 <b>Q. And is the ski run that is shown in</b> 25 <b>Exhibit 24, is that the run you skied shortly</b></p>

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<p style="text-align: right;">Page 9</p> <p>1 before you witnessed Mr. Meyer's ski wreck?</p> <p>2 A. Correct. So as I'm looking at this,</p> <p>3 directly behind me is the sort of steep slope and I</p> <p>4 had come down that slope and rested on that</p> <p>5 traversing road. When I say "rested," I stopped</p> <p>6 and I was waiting for the rest of our sort of</p> <p>7 subset group to catch up with me.</p> <p>8 Q. Okay. Let me show you another picture</p> <p>9 taken just a little bit further downhill. This is</p> <p>10 a photograph that's been previously marked in this</p> <p>11 case as Exhibit Number 25.</p> <p>12 A. Uh-huh.</p> <p>13 Q. And do you recognize what is shown in</p> <p>14 Exhibit 25?</p> <p>15 A. Yeah. So that's the traversing road.</p> <p>16 Q. The cat track that you see going from --</p> <p>17 A. Correct.</p> <p>18 Q. -- right to left of the --</p> <p>19 A. Yep.</p> <p>20 Q. -- photograph?</p> <p>21 And do you agree that Exhibit 25 shows</p> <p>22 the area that you skied shortly before you saw</p> <p>23 Mr. Meyer's ski wreck?</p> <p>24 A. Correct.</p> <p>25 Q. And do I understand you to say from your</p>	<p style="text-align: right;">Page 11</p> <p>1 Q. You were able to safely make the</p> <p>2 transition from the cat track onto the run?</p> <p>3 A. Hum.</p> <p>4 Q. In other words, you didn't wreck when</p> <p>5 you skied onto the cat track, did you?</p> <p>6 A. Yeah, I just think you had it in</p> <p>7 reverse. I was able to successfully go down the</p> <p>8 ski run to the cat track.</p> <p>9 Q. And were you skiing in control?</p> <p>10 A. Absolutely.</p> <p>11 Q. And you then stopped on the cat track?</p> <p>12 A. Correct.</p> <p>13 Q. Okay. I want to show you one more</p> <p>14 photograph. This is a photograph that was</p> <p>15 previously marked in this case as Exhibit Number</p> <p>16 29.</p> <p>17 Now looking at all of those photographs</p> <p>18 that you have in front of you, did you stop on the</p> <p>19 cat track in approximately the area where the</p> <p>20 person is shown in Exhibit 29?</p> <p>21 A. Yes.</p> <p>22 Q. And when you stopped there, did you then</p> <p>23 look back uphill to see the other skiers that you</p> <p>24 were with?</p> <p>25 A. Yes, I was waiting for the rest of the</p>
<p style="text-align: right;">Page 10</p> <p>1 earlier testimony that you skied down this -- down</p> <p>2 this ski run and stopped on the cat track shown in</p> <p>3 Exhibit 25?</p> <p>4 A. Correct.</p> <p>5 Q. Would you agree with me that you can see</p> <p>6 the cat track in Exhibit 25?</p> <p>7 A. Correct, yes.</p> <p>8 Q. Would you agree with me that it's</p> <p>9 obvious?</p> <p>10 A. Oh, yeah. Yes.</p> <p>11 Q. And above that we see some trees and I</p> <p>12 guess sort of stumps and things like that sticking</p> <p>13 through the snow; is that right?</p> <p>14 A. I don't see stumps. I see sort of low</p> <p>15 trees, brush.</p> <p>16 Q. That's probably a better description,</p> <p>17 thank you. Thank you, Mr. Makin [sic] -- Mr.</p> <p>18 McMakin.</p> <p>19 And is that the type of thing that you</p> <p>20 expect to see when you're skiing in early season</p> <p>21 conditions?</p> <p>22 A. Yes.</p> <p>23 Q. And were you able to safely ski down the</p> <p>24 run shown in Exhibit 25 onto the cat track?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 12</p> <p>1 party to catch up.</p> <p>2 Q. Okay. So you were skiing faster than</p> <p>3 them or you got down to that area faster than they</p> <p>4 did?</p> <p>5 A. Yeah. I might have started first.</p> <p>6 Q. Okay.</p> <p>7 A. They might have been gaining on me, I</p> <p>8 don't know.</p> <p>9 Q. And when you look back uphill, did you</p> <p>10 see a person coming down that you eventually</p> <p>11 learned was John Meyer?</p> <p>12 A. Yes.</p> <p>13 Q. And can you describe for me what you saw</p> <p>14 when you saw Mr. Meyer skiing down the hill?</p> <p>15 A. You know what I told my wife, I said he</p> <p>16 was -- there was a guy, he came around kind of the</p> <p>17 high corner and he was bombing down the slope at</p> <p>18 sort of like -- at a high speed.</p> <p>19 Q. Okay. What do you mean "bombing down</p> <p>20 the slope"?</p> <p>21 A. You know, when you ski -- you know, this</p> <p>22 is sort of -- it's rough and it's hard to tell with</p> <p>23 these pictures but it's -- you know, I have a</p> <p>24 strong recollection that it was lightly moguled and</p> <p>25 when you ski something like that, people like me</p>

<p style="text-align: right;">Page 13</p> <p>1 tend to carve their way down through the moguls  2 and -- but when someone's bombing down, they're  3 taking the moguls all in their thighs, bumping  4 straight down with no curves at all. So that's  5 what I mean by "bombing."  6 <b>Q. Okay. And was Mr. Meyer skiing down the</b>  7 <b>run shown in Exhibits 24 and 25?</b>  8 A. Correct.  9 <b>Q. And did he ski down toward you when you</b>  10 <b>were standing on the cat track in the location of</b>  11 <b>the person shown in Exhibit 29?</b>  12 A. Correct. He basically was following the  13 same path that I took to get to the cat track.  14 <b>Q. Okay. And was he skiing faster than you</b>  15 <b>would expect someone who described themselves as an</b>  16 <b>intermediate skier to ski?</b>  17 MS. WALAS: Objection, foundation.  18 MR. McINTOSH: Go ahead.  19 THE WITNESS: I can go ahead?  20 MR. McINTOSH: Yes.  21 THE WITNESS: Absolutely faster than an  22 intermediate skier, sort of a -- I would have  23 characterized his skiing as the kind of skiing that  24 only someone that was a high expert would ski.  25 ///</p>	<p style="text-align: right;">Page 15</p> <p>1 use the cat track as a jump.  2 <b>Q. And why do you say he was -- why do you</b>  3 <b>say you thought he was going to use the cat track</b>  4 <b>as a jump?</b>  5 A. Because he didn't slow down at all and  6 it was -- it was obvious that the cat track was in  7 front of him, but more obvious was that there was a  8 drop-off on the other side.  9 <b>Q. The downhill side of the cat track?</b>  10 A. Yeah, exactly, exactly. Into an  11 unplowed area -- or not unplowed, ungroomed area or  12 unskied area.  13 <b>Q. Okay. Was there anything that would</b>  14 <b>have prevented Mr. Meyer from slowing down or</b>  15 <b>stopping on the cat track where you stopped?</b>  16 A. If he had been going at a lower rate of  17 speed, nothing would have prevented him. But at  18 that speed, I'm not sure he could have stopped at  19 the last minute if he wanted to.  20 <b>Q. Okay. So what happened after Mr. Meyer</b>  21 <b>safely transitioned onto the cat track?</b>  22 A. He was launched into the air and flipped  23 around.  24 <b>Q. And did it look to you like he was</b>  25 <b>trying to jump off the downhill edge of the cat</b></p>
<p style="text-align: right;">Page 14</p> <p>1 BY MR. McINTOSH:  2 <b>Q. And did Mr. Meyer --</b>  3 A. Very fast.  4 <b>Q. Excuse me, very fast?</b>  5 A. Yes.  6 <b>Q. So you would agree that Mr. Meyer was</b>  7 <b>skiing very fast?</b>  8 A. Very fast.  9 <b>Q. Faster than you skied the run?</b>  10 A. A lot faster than I skied the run, a lot  11 faster than anyone else skied the run that I saw.  12 <b>Q. And did Mr. Meyer slow down before he</b>  13 <b>reached the cat track that you were standing on?</b>  14 A. No.  15 <b>Q. And did Mr. Meyer -- well, did he safely</b>  16 <b>ski onto the cat track?</b>  17 A. He did.  18 <b>Q. Can you just describe for me what you</b>  19 <b>saw as Mr. Meyer transitioned from this run shown</b>  20 <b>in Exhibit 24 and 25 onto the cat track?</b>  21 A. So my impression in the split second  22 that this all transpired was that he was a high  23 expert skier. He was sort of hotdogging down the  24 slope at a high rate of speed capitalizing on his  25 high ability to do that and that he was going to</p>	<p style="text-align: right;">Page 16</p> <p>1 <b>track?</b>  2 A. It did.  3 <b>Q. And then what happened?</b>  4 A. So he landed on his back in deep snow.  5 And the reason I feel like I thought he was trying  6 to jump is because I thought that he failed to do  7 what he wanted to do, which was to jump  8 successfully and flip. And I remember saying -- it  9 was a little uncharacteristic for me but I was like  10 "Whoa, dude, that was awesome. Are you all right?"  11 Because I thought he was trying to execute a really  12 hard thing to do, which was flip off the cat track.  13 <b>Q. And did you go to Mr. Meyer's aid and</b>  14 <b>help him?</b>  15 A. So I looked at him and I said that  16 and then -- and he didn't answer. And so then I  17 kind of got off the cat track and started to  18 traverse the unskied area, the deeper snow and I  19 probably -- I didn't go very far, five feet or so,  20 and then I could see that he was on his back and  21 his arms were wide open and he was shaking and it  22 looked like something was coming out of his mouth.  23 And I was like, oh, my God, he's in deep trouble,  24 deep, deep trouble, and that's when I saw the log.  25 He basically flipped and landed on a log. And I</p>

<p style="text-align: right;">Page 17</p> <p>1 immediately thought well, he's broken his neck.  2 Shall I just continue?  3 And so I remember -- I mean I remember  4 this very clearly, there were some younger people.  5 I can't call them kids, right? I'm like anybody  6 younger -- I'm 58, so younger than I am, people,  7 sort of a mass on the cat track, maybe 12 people or  8 so. And this shows my age. I said, "Someone ski  9 down and get ski patrol."  10 And then some kid said "Or, dude, we  11 could just call them on the cell phone."  12 And I was like, "Right. You're right.  13 That is what you could do. That would be better."  14 <b>Q. So someone called ski patrol?</b>  15 A. I assume. Ski patrol was there very  16 quickly.  17 <b>Q. Very quickly?</b>  18 A. Very quickly.  19 <b>Q. And when Mr. Meyer tried to -- or based</b>  20 <b>on what you thought he was trying to do, tried to</b>  21 <b>jump off that downhill edge of the cat track, how</b>  22 <b>far away were you?</b>  23 A. That's a good question. Probably 10  24 feet.  25 <b>Q. And based on what you saw and what you</b></p>	<p style="text-align: right;">Page 19</p> <p>1 <b>Q. Thank you.</b>  2 A. Yeah.  3 VIDEO TECHNICIAN: We're now off the record.  4 The time is 1:50.  5 (Whereupon, a brief  6 recess was taken.)  7 VIDEO TECHNICIAN: We're now back on the  8 record. The time is 1:51.  9 MR. McINTOSH: Mr. McMakin, thank you for  10 your time. Thank you for coming in today. I have  11 no further questions at this time.  12 THE WITNESS: Thanks.  13 EXAMINATION  14 BY MS. WALAS:  15 <b>Q. All right. Mr. McMakin, I want to</b>  16 <b>follow up on a couple of things that you were asked</b>  17 <b>about and then also some other further questions I</b>  18 <b>might have.</b>  19 <b>You were asked about Exhibit 24.</b>  20 A. Which one is that?  21 <b>Q. Which would be the one that has this</b>  22 <b>little guy over here in the corner.</b>  23 A. Oh, this guy. I got it.  24 <b>Q. Yep. And 25, which would be the one</b>  25 <b>that you have three guys?</b></p>
<p style="text-align: right;">Page 18</p> <p>1 <b>observed from 10 feet away, what did you conclude</b>  2 <b>was the cause of Mr. Meyer's ski wreck?</b>  3 A. His failure to execute the jump off  4 of this track or -- you know, I felt like  5 there's -- there was a change. So you had this  6 sort of skied area, so that's one kind of  7 topography, and then you have the track, so you hit  8 the track, but it's quite -- it's quite packed  9 down. It has a kind of accelerating kind of  10 function that it plays and then on the other side  11 of it it got rough again. And I thought he hit  12 that roughness on the far side of the track and  13 that that flipped him over. But it's conjecture on  14 my part. But that's what it felt like.  15 Anyway, if you ski, you know that a  16 change in the quality of the snow from fast and  17 slick to rough and unskied and icy and choppy can  18 trip you up.  19 <b>Q. And did you believe Mr. Meyer's speed he</b>  20 <b>was skiing at contributed to his ski wreck?</b>  21 A. Absolutely.  22 <b>Q. Mr. McMakin, I believe that's all the</b>  23 <b>questions I have. If we could just go off the</b>  24 <b>record for a few minutes while I check my notes.</b>  25 A. You bet.</p>	<p style="text-align: right;">Page 20</p> <p>1 A. Yep.  2 <b>Q. Okay. Where were you standing on the</b>  3 <b>cat track in relation to Mr. Meyer's wreck?</b>  4 A. You know, to be honest, I don't recall  5 but roughly where those three people are.  6 <b>Q. Okay. And that's on Exhibit 25?</b>  7 A. Yeah.  8 <b>Q. Okay. And where did Mr. Meyer wreck?</b>  9 A. In the snow field above in the picture  10 of the three people.  11 <b>Q. Above the picture of the three people?</b>  12 A. Yeah.  13 <b>Q. So if you were -- I'm going to go ahead</b>  14 <b>and give you this blue pen.</b>  15 A. Uh-huh.  16 <b>Q. And if you'll go ahead and mark that,</b>  17 <b>I'm going to make this Depo Exhibit 1.</b>  18 MR. McINTOSH: No.  19 MS. WALAS: Do you guys roll over?  20 MR. McINTOSH: Yep.  21 MS. WALAS: Okay. What number are we on?  22 MR. McINTOSH: 65.  23 MS. WALAS: 65, okay. So this will be  24 Exhibit 65.  25 ///</p>

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<p>1 (Whereupon, Deposition 2 Exhibit Number 65 was 3 marked for identification.) 4 THE WITNESS: So roughly there. 5 BY MS. WALAS: 6 <b>Q. Roughly there?</b> 7 A. Yeah. 8 <b>Q. Okay. And if you don't mind, will you</b> 9 <b>circle that just to make it clear?</b> 10 A. Uh-huh. 11 <b>Q. Perfect.</b> 12 <b>And then using that same picture, can</b> 13 <b>you recall where you were?</b> 14 A. You know, I'm saying roughly here. I 15 was to the -- so I know I was to the left. So if 16 it happened over here, that wouldn't surprise me. 17 <b>Q. Okay.</b> 18 A. But I was roughly to the left of 19 something that happened down here. But I don't 20 really recall. 21 <b>Q. Okay. And when you were coming down the</b> 22 <b>hill, did you see the rocks that Mr. Meyer hit?</b> 23 MR. McINTOSH: Objection, assumes facts not 24 in evidence. Counsel's testifying. 25 MS. WALAS: You can go ahead and answer.</p>	<p>1 (Whereupon, Deposition 2 Exhibit Number 66 was 3 marked for identification.) 4 MS. WALAS: We can go off the record real 5 quick. 6 VIDEO TECHNICIAN: We're now off the record. 7 The time is 1:55. 8 (Whereupon, an off- 9 the-record-discussion 10 then took place.) 11 VIDEO TECHNICIAN: We're back on the record. 12 The time is 1:56. 13 BY MS. WALAS: 14 <b>Q. So I've given you what is Exhibit 66 and</b> 15 <b>is that your witness statement?</b> 16 A. Yes. 17 <b>Q. Now is there anything in this witness</b> 18 <b>statement that you would change or add to?</b> 19 A. So let's read it aloud because I'm not 20 sure I can read it. "Tom was standing" -- what's 21 the next word there? 22 <b>Q. I believe it's "below."</b> 23 A. "Below the patient to his right. 24 Patient came down from" -- so that first sentence, 25 "Tom was standing below the patient to his right."</p>
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<p>1 MR. McINTOSH: You can answer. 2 THE WITNESS: I don't know. So I mean I know 3 that I saw -- I know that I saw the ungroomed area 4 that he crashed in that had early season stuff in 5 it, trees and bushes and rocks and whatnot. But 6 the rocks that he hit, I don't know. I don't know 7 that I -- it registered on my consciousness. I 8 mean I know that I was looking at it when I went 9 down the slope and stopped. 10 BY MS. WALAS: 11 <b>Q. And do you recall giving statements to</b> 12 <b>Big Sky?</b> 13 A. Yes, I do. 14 <b>Q. Okay. And do you recall in that</b> 15 <b>statement what you told them?</b> 16 A. I do not specifically, no. 17 <b>Q. Would it be helpful to see these?</b> 18 A. Yeah, that would be super. Yeah. I 19 mean they asked questions not -- so dissimilar to 20 what you all are asking right now, mainly what 21 happened. 22 MS. WALAS: I apologize, I did not bring 23 copies. This will be 66. Go ahead and mark this 24 as Exhibit 66. 25 ///</p>	<p>1 So directions are a funny thing. So I was on the 2 cat. So first of all, "his" -- it's unclear 3 whether "his" refers to patient or me. But I'll 4 tell you what I know, which is that I was standing 5 on the cat track and I was -- I was stopped, my 6 skis were together, I was facing more toward the 7 south than to the right of the cat track. I was 8 facing that direction. And my head was turned 9 uphill to my right and the skier came down the 10 slope to my right. I'm not sure if that first 11 sentence says that or not, but that's what 12 happened. 13 So the second sentence says "Patient 14 came down from highway." So I don't know what 15 highway refers to. Is that the cat track? Because 16 he came down from the slope above the cat track and 17 hit rocks as he was about to jump off of Morning 18 Star Road, Loop Road. "Both skis ejected and he 19 rotated head first and landed on a log with the 20 back of his head and neck. He was unconscious the 21 entire time but was breathing. He did not move, 22 eyes did not open. Breathing through nose only." 23 Does that sound like what it says? 24 <b>Q. I mean I think you've read it back</b> 25 <b>accurately.</b></p>



Page 25	Page 27
<p>1 <b>Is there anything in there that you</b>  2 <b>disagree with?</b>  3 MR. McINTOSH: Objection, vague.  4 MS. WALAS: I'll restate it.  5 BY MS. WALAS:  6 <b>Q. Do you recall this being an accurate</b>  7 <b>representation of what you told the Big Sky ski</b>  8 <b>patrol that day?</b>  9 A. Yes.  10 <b>Q. And do you recall calling Big Sky back a</b>  11 <b>couple days later to give a follow-up statement?</b>  12 A. Yes. Did I? I don't recall that, no.  13 <b>Q. Okay.</b>  14 A. No, I called back later and asked if the  15 patient was okay.  16 <b>Q. Okay.</b>  17 A. Because it flipped me out. I thought  18 the guy was dead. I really did. Because they  19 choppered him off to Billings and a couple -- and I  20 didn't see anything in the newspaper. And so a  21 couple days later I called back and I said, "What  22 happened to that guy?"  23 (Whereupon, Deposition  24 Exhibit Number 67 was  25 marked for identification.)</p>	<p>1 THE WITNESS: So let's be clear. So he's  2 coming down the ski slope, he hits the track, the  3 snow is rough. On the downside of that lip, my  4 recollection is there was exposed gravel on the  5 downside of the lip. He flipped and he landed on a  6 tree. So you're using -- you're saying where he  7 crashed. So there are two different elements of  8 the crash, where the crash was initiated and where  9 it ended.  10 MS. WALAS: Okay.  11 THE WITNESS: So there wasn't a log on the  12 road. But my recollection is that on this track,  13 on the downhill side there was a lip of icy  14 granular snow and then it was bare on the downhill  15 side there. There was gravel.  16 BY MS. WALAS:  17 <b>Q. Okay. And in looking --</b>  18 A. Early season conditions.  19 <b>Q. And in looking at these pictures, can</b>  20 <b>you see the gravel that you're speaking of --</b>  21 A. No.  22 <b>Q. -- in either Exhibit 25 or 24 from</b>  23 <b>above?</b>  24 A. No.  25 <b>Q. Okay. And is the gravel that you're</b></p>
Page 26	Page 28
<p>1 BY MS. WALAS:  2 <b>Q. Okay. I have what I've marked as</b>  3 <b>Exhibit 67. Do you recall who you spoke to when</b>  4 <b>you called back at Big Sky?</b>  5 A. No.  6 <b>Q. Okay. Do you recall if it was male or</b>  7 <b>female?</b>  8 A. I don't recall.  9 <b>Q. Okay. I'll go ahead and give you</b>  10 <b>Exhibit 67 and let you take a look at that and I'll</b>  11 <b>ask you some questions on that.</b>  12 A. Yes.  13 <b>Q. Now do you recall telling this person at</b>  14 <b>Big Sky that Mr. Meyer hits rocks after the cat</b>  15 <b>track?</b>  16 A. Yes.  17 <b>Q. Okay. So this is an accurate</b>  18 <b>representation of the statement that you made to</b>  19 <b>Big Sky?</b>  20 A. Correct.  21 <b>Q. Okay. Now these rocks or log or this</b>  22 <b>area where Mr. Meyer wrecked, was it marked in any</b>  23 <b>way?</b>  24 A. So let's --  25 MR. McINTOSH: Objection, vague.</p>	<p>1 <b>talking about now, are those the rocks that you're</b>  2 <b>referring to in this statement?</b>  3 A. Correct.  4 <b>Q. Okay. And so at that gravel were there</b>  5 <b>any warning signs --</b>  6 A. No.  7 <b>Q. -- posted?</b>  8 <b>And were there any -- were there any</b>  9 <b>signs in the area at all identifying the cat track</b>  10 <b>or the road?</b>  11 A. I don't recall. Lots of signs saying  12 early season conditions.  13 <b>Q. Okay.</b>  14 A. But I don't recall whether there was a  15 specific sign on the cat track. I just don't  16 recall anything. My recollection is that there  17 wasn't, but I don't recall.  18 <b>Q. And do you recall if there was a</b>  19 <b>chairlift in the area?</b>  20 A. So that's a good question. I don't -- I  21 don't ski this very much and so I don't -- I don't  22 have a good memory of that.  23 <b>Q. Okay.</b>  24 A. It seemed like there was a chairlift up  25 here to the right but that's the vaguest of</p>

Page 29	Page 31
<p>1 possible memories.</p> <p>2 <b>Q. Okay. So you're unclear if there was a</b></p> <p>3 <b>chairlift or not?</b></p> <p>4 A. Yeah, I am unclear.</p> <p>5 <b>Q. And what do you consider early ski</b></p> <p>6 <b>conditions? You've been throwing that term around</b></p> <p>7 <b>and I just want to make sure that we're on the same</b></p> <p>8 <b>page when you're talking about early ski</b></p> <p>9 <b>conditions.</b></p> <p>10 A. So patchy snow with obstacles. So thin</p> <p>11 cover bleeding through to tree stumps and rocks</p> <p>12 that you have to ski around or they'll trip you up.</p> <p>13 <b>Q. Okay. And you said something earlier in</b></p> <p>14 <b>your testimony that you -- you stopped on the cat</b></p> <p>15 <b>track or road. I know everybody that skis refers</b></p> <p>16 <b>to them as different things. So when I say cat</b></p> <p>17 <b>track and road I mean the same thing.</b></p> <p>18 Now you had planned to stop there,</p> <p>19 correct?</p> <p>20 A. Yes.</p> <p>21 <b>Q. And with that knowledge, had you slowed</b></p> <p>22 <b>down prior to getting there?</b></p> <p>23 A. Yeah.</p> <p>24 <b>Q. Okay. And when you normally ski, if</b></p> <p>25 <b>you're not going to stop -- be stopping to wait for</b></p>	<p>1 <b>to what he was doing?</b></p> <p>2 A. Yeah. It's just conjecture based on the</p> <p>3 fact that it was -- he hadn't slowed down. He</p> <p>4 wasn't turning. He was going straight down the</p> <p>5 hill at a high rate of speed.</p> <p>6 <b>Q. Okay. And do you know Mr. Meyer's</b></p> <p>7 <b>skiing ability?</b></p> <p>8 A. I have no idea.</p> <p>9 <b>Q. And --</b></p> <p>10 A. He's a pretty good skier. I guess I do</p> <p>11 know a little bit, right? I saw him for five</p> <p>12 seconds ski down a difficult run at a high rate of</p> <p>13 speed and he was -- he knows what he's doing. He's</p> <p>14 got strong legs and he was hitting those moguls</p> <p>15 hard.</p> <p>16 <b>Q. Now besides the call back and the ski</b></p> <p>17 <b>patroller that day at Big Sky, have you spoken to</b></p> <p>18 <b>anyone else from Big Sky?</b></p> <p>19 A. Like I said, I had this recollection of</p> <p>20 calling and asking if he was okay.</p> <p>21 <b>Q. The day of the wreck, did you talk to</b></p> <p>22 <b>any of the ski patrollers around?</b></p> <p>23 A. So when they -- there were quite a</p> <p>24 number of ski patrollers that came on the scene. I</p> <p>25 might have said a few words like "Can I help?" I</p>
Page 30	Page 32
<p>1 <b>people on the cat track, do you just keep at your</b></p> <p>2 <b>speed and just keep going down?</b></p> <p>3 MR. McINTOSH: Objection, vague.</p> <p>4 THE WITNESS: I think sometimes, yes, and</p> <p>5 sometimes, no. That's the fun of skiing, right?</p> <p>6 MS. WALAS: Okay.</p> <p>7 THE WITNESS: But I might have skied down and</p> <p>8 just -- so you couldn't go straight on, right?</p> <p>9 That's not an option. It was not -- that was not</p> <p>10 open. But I could have -- and it's downhill so the</p> <p>11 option is to take the cat track over left a little</p> <p>12 left and then ski down over to this broader area.</p> <p>13 And so I could imagine being by myself or with my</p> <p>14 son and just skiing onto that cat track and sliding</p> <p>15 parallel on the cat track and moving forward</p> <p>16 because it's flat and you might want to keep your</p> <p>17 speed going. But I can imagine stopping too and</p> <p>18 it's in the moment.</p> <p>19 BY MS. WALAS:</p> <p>20 <b>Q. Okay. And on December 11th you don't</b></p> <p>21 <b>know what Mr. Meyer's intentions were as he was</b></p> <p>22 <b>going down the hill?</b></p> <p>23 A. No. No way I could know.</p> <p>24 <b>Q. And so when you testified that he was</b></p> <p>25 <b>getting ready to jump, that's just your guessing as</b></p>	<p>1 think I took his skis. Like his skis had been</p> <p>2 ejected and I was like, "Can I take them over to</p> <p>3 the toboggan?" And they said that would be</p> <p>4 helpful. I was trying to be helpful. And then</p> <p>5 they asked me to -- so they put him in the toboggan</p> <p>6 and took him over on this broad slope and went</p> <p>7 down. And they asked me to ski behind them and</p> <p>8 meet them at the ski patrol hut where I then made a</p> <p>9 statement. So yes, I guess I do.</p> <p>10 <b>Q. And you said there were a lot of ski</b></p> <p>11 <b>patrollers around. Do you recall any of the ski</b></p> <p>12 <b>patrollers saying anything about the area that you</b></p> <p>13 <b>were standing in, like make any comments that just</b></p> <p>14 <b>stuck out in your mind?</b></p> <p>15 A. No. They seemed very focused on the</p> <p>16 quality of care. And there was clearly a senior</p> <p>17 person, whether it was a doctor or, I don't know, a</p> <p>18 senior medical person that -- my recollection is</p> <p>19 that they felt lucky that that person was there and</p> <p>20 available and on the scene and he seemed like he</p> <p>21 was giving the orders. And they were just like</p> <p>22 focused on getting this guy immobilized on the</p> <p>23 toboggan down the hill as quickly as possible.</p> <p>24 <b>Q. And have you spoken to Big Sky's counsel</b></p> <p>25 <b>about this case?</b></p>



<p style="text-align: right;">Page 33</p> <p>1 A. Yes.</p> <p>2 <b>Q. Okay. How many times have you spoken</b></p> <p>3 <b>with him?</b></p> <p>4 MR. McINTOSH: Objection, relevance.</p> <p>5 THE WITNESS: Less than seven and more than</p> <p>6 two. I mean, so I think you spoke to me on the</p> <p>7 phone, you had me do an affidavit, we -- the</p> <p>8 plaintiff scheduled the deposition, the deposition</p> <p>9 didn't happen, the deposition got rescheduled.</p> <p>10 There was -- we've had some contact but really one</p> <p>11 substantive time, is my recollection about what</p> <p>12 happened.</p> <p>13 MS. WALAS: Okay.</p> <p>14 THE WITNESS: Yeah. The rest seemed like</p> <p>15 scheduling and the kind of comedy of errors around</p> <p>16 scheduling and representation.</p> <p>17 BY MS. WALAS:</p> <p>18 <b>Q. Okay. And when you say "substantive"</b></p> <p>19 <b>conversation, is that in relation to the affidavit</b></p> <p>20 <b>you prepared?</b></p> <p>21 A. Correct.</p> <p>22 <b>Q. And the facts that you put in that</b></p> <p>23 <b>affidavit, that was -- those were your facts,</b></p> <p>24 <b>correct?</b></p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 35</p> <p>1 MS. WALAS: I don't have any further</p> <p>2 questions at this time. Thank you.</p> <p>3 THE WITNESS: Thank you.</p> <p>4 RE-EXAMINATION</p> <p>5 BY MR. McINTOSH:</p> <p>6 <b>Q. Mr. McMakin, just a few follow-up</b></p> <p>7 <b>questions.</b></p> <p>8 <b>First of all, you said you recalled on</b></p> <p>9 <b>December 11, 2015 when you skied in Big Sky, you</b></p> <p>10 <b>said you saw lots of signs that said early season</b></p> <p>11 <b>conditions. Do you remember saying that?</b></p> <p>12 A. I do remember saying that, yes.</p> <p>13 <b>Q. Do you also recall seeing -- I'm going</b></p> <p>14 <b>to show you what's been previously marked as</b></p> <p>15 <b>Exhibit 19, and do you see the sign shown in</b></p> <p>16 <b>Exhibit 19?</b></p> <p>17 A. I see the sign in this picture, yes.</p> <p>18 <b>Q. And can you read that that sign states</b></p> <p>19 <b>"Caution, Unmarked Hazards"?</b></p> <p>20 A. Yes.</p> <p>21 <b>Q. And do you recall seeing signs that said</b></p> <p>22 <b>"Caution, Unmarked Hazards" on December 11, 2015?</b></p> <p>23 A. I do, but I couldn't locate where this</p> <p>24 sign is.</p> <p>25 <b>Q. You were asked by counsel a number of</b></p>
<p style="text-align: right;">Page 34</p> <p>1 <b>Q. Okay. And nothing that your discussions</b></p> <p>2 <b>with counsel that have -- have they influenced your</b></p> <p>3 <b>testimony?</b></p> <p>4 A. No.</p> <p>5 <b>Q. Okay. And this is more of just a</b></p> <p>6 <b>practical question. We're videotaping your</b></p> <p>7 <b>deposition today I'm presuming because of the trial</b></p> <p>8 <b>will be in Great Falls. Would it be a hardship for</b></p> <p>9 <b>you to get to Great Falls in July to testify live?</b></p> <p>10 A. Define hardship.</p> <p>11 <b>Q. That's up to the court to define</b></p> <p>12 <b>hardship, but.</b></p> <p>13 A. I can get to Great Falls.</p> <p>14 <b>Q. You can?</b></p> <p>15 A. It's not convenient --</p> <p>16 <b>Q. Okay.</b></p> <p>17 A. -- right? It's a day of my life.</p> <p>18 MS. WALAS: If we can go off the record real</p> <p>19 quick, I might be all done.</p> <p>20 VIDEO TECHNICIAN: We're now off the record.</p> <p>21 The time is 2:10.</p> <p>22 (Whereupon, a brief</p> <p>23 recess was taken.)</p> <p>24 VIDEO TECHNICIAN: We're back on the record.</p> <p>25 The time is 2:10.</p>	<p style="text-align: right;">Page 36</p> <p>1 <b>questions about the rocks below the cat track, do</b></p> <p>2 <b>you recall those questions?</b></p> <p>3 A. I do recall.</p> <p>4 MR. McINTOSH: And we're on number 68; is</p> <p>5 that correct?</p> <p>6 MS. WALAS: Yes.</p> <p>7 (Whereupon, Deposition</p> <p>8 Exhibit Numbers 68 &amp; 69</p> <p>9 were marked for identification.)</p> <p>10 BY MR. McINTOSH:</p> <p>11 <b>Q. Mr. McMakin, I'm going to hand you two</b></p> <p>12 <b>photographs that I've marked as Exhibits 68 and 69.</b></p> <p>13 <b>Please take a minute to review those.</b></p> <p>14 A. (Witness complies.)</p> <p>15 MS. WALAS: The one with the person is 68.</p> <p>16 THE WITNESS: Okay.</p> <p>17 BY MR. McINTOSH:</p> <p>18 <b>Q. And do you recognize what is shown in</b></p> <p>19 <b>Exhibits 68 and 69?</b></p> <p>20 A. So I'm going to ask you some questions.</p> <p>21 So this is the cat track; is that correct?</p> <p>22 <b>Q. Correct.</b></p> <p>23 A. And is this -- this is not the cat</p> <p>24 track, this is below it. The cat track is up here</p> <p>25 where the packed snow is?</p>

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<p style="text-align: right;">Page 37</p> <p>1 <b>Q. And you're referring now to Exhibit 69?</b></p> <p>2 A. Correct.</p> <p>3 <b>Q. Yes.</b></p> <p>4 A. And you're looking over the edge of it,</p> <p>5 yes. So what was your question?</p> <p>6 <b>Q. My question was, do you recognize what's</b></p> <p>7 <b>shown in Exhibits 68 and 69?</b></p> <p>8 A. I have located them in my brain. These</p> <p>9 were not -- so the left, 69, might have been my</p> <p>10 perspective. But 68 was not my perspective. My</p> <p>11 perspective was more of the person that's pictured</p> <p>12 standing on the cat track.</p> <p>13 <b>Q. Okay. In picture 68?</b></p> <p>14 A. Correct.</p> <p>15 <b>Q. Okay. So would you agree with me that</b></p> <p>16 <b>Exhibit 68 is a sideways view of the rocks below</b></p> <p>17 <b>the cat track?</b></p> <p>18 A. Correct, looking uphill.</p> <p>19 <b>Q. And Exhibit 69 is a photograph looking</b></p> <p>20 <b>downhill at the rocks, correct?</b></p> <p>21 A. Correct, sort of more eastward.</p> <p>22 <b>Q. And in both photographs 68 and 69 you</b></p> <p>23 <b>can clearly see the rocks, correct?</b></p> <p>24 A. Correct.</p> <p>25 <b>Q. And are these -- the rocks shown in</b></p>	<p style="text-align: right;">Page 39</p> <p>1 <b>Q. Do you see that sign in any of the</b></p> <p>2 <b>pictures that you have been testifying about?</b></p> <p>3 A. I do not.</p> <p>4 <b>Q. That's it. That's all I have. Thank</b></p> <p>5 <b>you.</b></p> <p>6 A. Cool. Thank you both.</p> <p>7 <b>Q. Thank you.</b></p> <p>8 A. Onward and upward.</p> <p>9 VIDEO TECHNICIAN: This now ends the</p> <p>10 deposition. The time is 2:15.</p> <p>11</p> <p>12 (Whereupon, the taking</p> <p>13 of this videotaped deposition</p> <p>14 was concluded at 2:15 p.m.)</p> <p>15</p> <p>16</p> <p>17 SIGNATURE RESERVED</p> <p>18</p> <p>19</p> <p>20 * * * * *</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 38</p> <p>1 Exhibits 68 and 69, are those the rocks that you</p> <p>2 believe Mr. Meyer hit as you thought he was trying</p> <p>3 to jump off the cat track?</p> <p>4 A. Yes.</p> <p>5 <b>Q. And earlier you were asked a question</b></p> <p>6 <b>about what was going through Mr. Meyer's mind when</b></p> <p>7 <b>he came down and went by you. And, of course, you</b></p> <p>8 <b>don't know what was going through his mind, do you?</b></p> <p>9 A. Right. No, I do not.</p> <p>10 <b>Q. But from what you observed, did it look</b></p> <p>11 <b>to you like he was trying to jump off the downhill</b></p> <p>12 <b>edge of the cat track?</b></p> <p>13 A. Yes, that's what I said earlier. I</p> <p>14 believe that he was going straight down the hill at</p> <p>15 a high rate and he saw the cat track and he was</p> <p>16 going to jump off that lip.</p> <p>17 <b>Q. Thank you, Mr. McMakin. That's all the</b></p> <p>18 <b>follow-up questions I have.</b></p> <p>19 A. Okay.</p> <p>20 MS. WALAS: I just have one, maybe two.</p> <p>21 RE-EXAMINATION</p> <p>22 BY MS. WALAS:</p> <p>23 <b>Q. You were asked about Exhibit 19 about</b></p> <p>24 <b>that sign?</b></p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 40</p> <p>1 DEPONENT'S CERTIFICATE</p> <p>2 PAGE LINE CORRECTION</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14 I, TOM McMAKIN, the deponent in the</p> <p>15 foregoing deposition, DO HEREBY CERTIFY, that I</p> <p>16 have read the foregoing -40- pages of typewritten</p> <p>17 material and that the same is, with any corrections</p> <p>18 thereon made in ink on the correction sheet and</p> <p>19 signed by me, a full, true and correct transcript</p> <p>20 of my oral deposition given at the time and place</p> <p>21 hereinbefore mentioned.</p> <p>22 DATED this _____ day of _____, 2020.</p> <p>23</p> <p>24</p> <p>25 _____</p> <p style="text-align: center;">TOM McMAKIN</p>

10 (Pages 37 to 40)

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## 1 CERTIFICATE

2 STATE OF MONTANA )

3 ) ss.

4 COUNTY OF GALLATIN )

5 I, Marla Jeske, Court Reporter - Notary  
6 Public, CSR, in and for the County of Gallatin,  
7 State of Montana, do hereby certify:

8 That the witness in the foregoing  
9 deposition was by me first duly sworn to testify  
10 the truth, the whole truth and nothing but the  
11 truth in the foregoing cause; that the deposition  
12 was then taken before me at the time and place  
13 herein named; that the deposition was reported by  
14 me in shorthand and later transcribed into  
15 typewriting under my direction, and the foregoing  
16 pages contain a true record of the testimony of the  
17 witness, all done to the best of my skill and  
18 ability.

19 IN WITNESS WHEREOF, I have hereunto set  
20 my hand and affixed my notarial seal this \_\_\_\_ day  
21 of \_\_\_\_\_, 2020.

22 \_\_\_\_\_  
23 Notary Public for the State of Montana  
24 residing at: Bozeman  
25 My commission expires: February 04, 2023

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## DEPONENT'S CERTIFICATE

PAGE

LINE

CORRECTION

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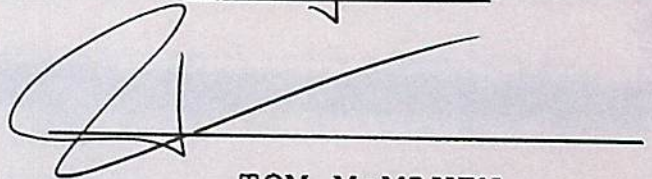
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I, TOM McMAKIN, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing -40- pages of typewritten material and that the same is, with any corrections thereon made in ink on the correction sheet and signed by me, a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

DATED this 5<sup>th</sup> day of February, 2020.



TOM McMAKIN

BRIDGER COURT REPORTERS, INC.  
(406) 582-0668

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